(3)

Supreme Court, U.S.
FILED
APR 3 1996
CLERK

NO. 95-1352

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GARY EDWARDS and TANA WOOD,

Petitioners,

v.

JERRY B. BALISOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

TALIS MERLE ABOLINS
JOHN SCOTT BLONIEN*
WILLIAM BERGGREN COLLINS
MARY E. FAIRHURST
Assistant Attorneys General
*Counsel of Record**
Counsel for Petitioners

P. O. Box 40116
Olympia, Washington 98504-0116
(360) 586-1445

April 1996

13pp

TABLE OF CONTENTS

A. The Respondent Concedes That Petitioners Have Identified A Conflict Among The Circuit Courts Of Appeals. 1

B. *Heck v. Humphrey* Neither Resolved Nor Addressed The Conflict And Confusion Stemming From *Wolff* And *Preiser*. 1

C. Since *Heck v. Humphrey*, Federal Courts Continue To Struggle With Jurisdiction Over Challenges To Prison Discipline. 4

D. Respondent's Due Process Claim Calls Into Question His Loss of Good-Time Credits. 6

TABLE OF AUTHORITIES

Cases	Page
Armento-Bey v. Harper, 68 F.3d 215 (8th Cir. 1995)	4, 5
Broussard v. Johnson, ___F. Supp. ___, 1996 WL 115450 (E.D. Tex. 1996)	4
Caldwell v. Line, 679 F.2d 494 (5th Cir. 1982)	2
Campbell v. Henman, 931 F.2d 1212 (7th Cir. 1991)	7
Clark v. Thompson, 960 F.2d 663 (7th Cir. 1992)	3
Cochrell v. Purkett, 1996 WL 78179 (8th Cir. 1996)	4, 6
Gibbons v. Higgins, 1995 WL 761743 (7th Cir. 1995)	1, 4
Gotcher v. Wood, 66 F.3d 1097 (9th Cir. 1995)	4
Hayes v. Thompson, 637 F.2d 483 (7th Cir. 1980)	7
Heck v. Humphrey, 512 U.S. ___, 114 S. Ct. 2364 (1994)	1, 2, 4-6
Hrbek v. State, 478 N.W.2d 617 (Iowa 1991)	7

In re Anderson, 112 Wn.2d 546 P.2d 510 (1989)	6, 7
In re Burton, _ Wn. App. _, 910 P.2d 1295 (1996)	7
In re Johnston, 109 Wn.2d 493, 745 P.2d 864 (1987)	6
In re Plunkett, 57 Wn. App. 230, 788 P.2d 1090 (1990)	7
In re Reismiller, 101 Wn.2d 291, 678 P.2d 323 (1984)	7
Kingsley v. Bureau of Prisons, 937 F.2d 26 (2nd Cir. 1991)	7
Mackey v. Dickson, 47 F.3d 744 (5th Cir. 1995)	2
Miller v. Indiana Dept. Of Corrections, 75 F.3d 330 (7th Cir. 1996)	4, 5
Morgan v. Ellerthorpe, 785 F.Supp. 295 (D.R.I. 1992)	7
Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987)	2, 3
Preiser v. Rodriguez, 411 U.S. 475 (1973)	1-3
Richmond v. Duke, 909 F. Supp. 626 (E.D. Ark. 1995)	2, 4, 5

Sandin v. Conner,
_ U.S. __, 115 S.Ct. 2293 (1995) 3

Serio v. Members of Louisiana State Board of Pardons,
821 F.2d 1112 (5th Cir. 1987) 3, 4

Wells v. Bonner,
45 F.3d 90 (5th Cir. 1995) 2

Williams v. Godinez,
1996 WL 124463 (N.D.Ill. 1996) 4, 5

Williams v. Hill,
74 F.3d 1339 (D.C. Cir. 1996) 2

Wolff v. McDonnell,
418 U.S. 539 (1974) 1, 7

Wood v. Gotcher,
Supreme Court No. 95-1385 (cert. pending) 3

A. The Respondent Concedes That Petitioners Have Identified A Conflict Among The Circuit Courts Of Appeals.

In our Petition, we asked this Court to accept review in order to resolve continuing conflict and confusion in the circuit courts. The conflict arises from the tension between this Court's decisions in *Preiser v. Rodriguez*, 411 U.S. 475 (1973) and *Wolff v. McDonnell*, 418 U.S. 539 (1974). In response, Respondent concedes that this Court's decisions in *Preiser* and *Wolff* have resulted in a "conflict in the Circuits pertaining to the issue raised" in this case. Respondent's Brief, at 5. Respondent also concedes that these cases have led to "problems" and "confusion in the lower courts", noting that the federal courts have "had difficulty determining when a claim under § 1983 was an attack on the fact or duration of confinement requiring exhaustion under *Preiser*, or whether it was truly one for damages not requiring state remedy exhaustion under *Wolff*." See Respondent's Brief at 5 - 8.

B. *Heck v. Humphrey* Neither Resolved Nor Addressed The Conflict And Confusion Stemming From *Wolff* And *Preiser*.

Having conceded the conflict, Respondent is left to argue that the conflict was "completely resolved" with a "simple test" in *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994). Respondent's Brief, at 8. *Heck*'s simple test did not resolve the conflict.[1]

---

[1]According to Respondent, *Heck* has clarified *Wolff* as a case that allows any prisoner to bypass habeas corpus with a narrowly drafted challenge to procedures of a specific disciplinary hearing, where the right to challenge the result is reserved for another case. Respondent's Brief, at 3-4, and 8. In an unpublished decision, the Seventh Circuit explicitly recognized that there was "a debate" as to "whether (or how) *Heck v. Humphrey* might apply in prison disciplinary cases." *Gibbons v. Higgins*, 1995 WL 761743 (7th Cir. 1995) (unpublished) (Posner, J., writing for the three-judge panel).

Heck has provided a simple test for cases, such as Heck's, where the civil rights claim will "necessarily" invalidate a criminal conviction. *Id.* at 2372. Because there was no question that Heck's challenge would have necessarily invalidated the fact of his confinement, the Court was able to resolve the claim based upon principles of tort law. The Court had no need to address the principles of federal-state comity that lie at the heart of *Preiser* and the exhaustion requirement itself. *See Williams v. Hill*, 74 F.3d 1339, 1340 (D.C. Cir. 1996); *Offet v. Solem*, 823 F.2d 1256, 1259 (8th Cir. 1987).

But *Heck* did not provide a simple test for cases, such as this one, that are likely to call a prisoner's loss of good-time credits into question. The Court merely indicated that such cases may proceed if the federal court "determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff". *Heck*, 114 S. Ct. at 2372 (emphasis in original).[2] This is the determination that federal courts will continue to struggle with whenever a prisoner labels his complaint as a civil rights challenge to procedures, rather than the outcome, of a disciplinary proceeding resulting in lost good-time credits.[3]

---

[2]*Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995); *Wells v. Bonner*, 45 F.3d 90, 94 (5th Cir. 1995); *Richmond v. Duke*, 909 F. Supp. 626 (E.D. Ark. 1995); *see also Caldwell v. Line*, 679 F.2d 494, 496 (5th Cir. 1982)(citations omitted) (holding that "the federal court must examine the basis of the complaint and determine whether the claim, if proven, would factually undermine or conflict" with the basis for confinement).

[3]Unlike Respondent, Heck was unable to drop his claim for relief from unlawful confinement for the sole purpose of circumventing the exhaustion requirement set forth in the habeas corpus statutes. This Court refused to allow it. *Heck*, 2368, n.2. Respondent admits he dropped his claim for good-time credits in response to *Heck*: "In response to this Court's holding in *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), Mr. Balisok amended his Complaint. ... [and] specifically omitted any request for restoration of lost good time credits." Respondent's Brief, at 3-4. He makes no effort to address the absurdity of a rule that would reward manipulative inmates who strive to bypass exhaustion, and punish unsophisticated inmates who unwittingly fail to specify a claim for early release. *See* Petition, at 22 and compare *Wood v. Gotcher*, Supreme Court No. 95-1385 (cert. pending).

The Eighth Circuit concisely described the unique problem as follows:

> The distinction adopted by some other federal courts between a challenge to the "manner" of applying prison disciplinary sanctions and one challenging the "outcome" of a particular proceeding seems to us no answer to the concerns of federalism that cases such as this one raise.

Offet v. Solem, 823 F.2d 1256, 1259 (8th Cir. 1987) (emphasis supplied); *see also Serio v. Members of Louisiana State Board of Pardons*, 821 F.2d 1112, 1116 (5th Cir. 1987); *Clark v. Thompson*, 960 F.2d 663, 664 (7th Cir. 1992). Because Heck directly and necessarily challenged the outcome of his criminal trial, his case provides "no answer to the concerns of federalism" that cases such as Respondent's raise. *See Offet*, 823 F.2d at 1259.[4]

---

[4]In *Sandin v. Conner*, this Court clarified the threshold standard for state-created liberty interests in order to reduce federal judicial involvement in the "day-to-day management of prisons", and to afford "appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, __ U.S. __, 115 S.Ct. 2293, 2299 (1995). Under this standard, prisoner due process claims are dismissed if they fail to identify an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.*, 115 S.Ct. at 2300. In light of *Sandin*, it is ironic that, because a prisoner has momentarily denied any interest in the return of lost good-time credits, the Ninth Circuit will require federal judicial involvement, and deprive states of their "first opportunity to correct the errors made in the internal administration of their prisons". *Preiser*, 411 U.S. at 492.

C. Since *Heck v. Humphrey*, Federal Courts Continue To Struggle With Jurisdiction Over Challenges To Prison Discipline.

Respondent's assertion that *Heck* has resolved the conflict and confusion is further refuted by cases decided since *Heck*. *Miller v. Indiana Dept. Of Corrections*, 75 F.3d 330, 331 (7th Cir. 1996); *Broussard v. Johnson*, ___F. Supp. ___, 1996 WL 115450, at 2 (E.D. Tex. 1996), *citing Serio*; *Richmond v. Duke*, 909 F. Supp. 626 (E.D. Ark. 1995). *See also Gibbons v. Higgins*, 1995 WL 761743 (7th Cir. 1995) (unpublished); *Cochrell v. Purkett*, 1996 WL 78179 (8th Cir. 1996) (unpublished); *Williams v. Godinez*, 1996 WL 124463 (N.D.Ill. 1996) (unpublished).

In *Miller*, an Indiana inmate brought a civil rights suit for damages, claiming that he was denied a classification that would have entitled him to good-time credits. Straining to avoid a conflict with *Gotcher* and *Armento-Bey*, the court incorrectly presumed that these civil rights claims went forward because the inmates "conceded that the correctional system had reached the right result".[5] *Miller*, 75 F.3d at 331. Because Miller did not concede that his procedural challenge was harmless, his case was properly dismissed:

> The issue, we emphasize, is not the relief sought, but the ground of the challenge. Although the only remedy that Miller seeks is damages, he claims that as a result of the alleged

[5]The Seventh Circuit's attempt to distinguish these cases was unsuccessful because in *Gotcher* the inmate specifically claimed that "his loss of good conduct time credits . . . constituted compensable violations of his due process rights." *Gotcher v. Wood*, 66 F.3d 1097, 1098 (9th Cir. 1995). Further, like Respondent, Armento-Bey never conceded that the loss of good-time credits was proper. *Armento-Bey*, 68 F.3d 215, 216 (8th Cir. 1995) (rather than concede a proper result, Armento-Bey only limited his claim for relief).

> denial of due process he was deprived of good-time credits to which he was entitled. So he is challenging the lawfulness of his continued confinement, and having failed to vindicate the challenge through the proper means he is barred from seeking vindication in this suit for damages.

Id. at 331. Unlike Miller, Respondent explicitly reserves the right to challenge his loss of good-time credits. App. F-4. If Respondent were in the Seventh Circuit, he would "not be able to use a suit for damages to get around the procedures that have been established for challenging the lawfulness of continued confinement." *Miller*, 75 F.3d at 331.

Similarly, in *Richmond*, the court noted the "basic dichotomy of *Heck*" between challenges that necessarily invalidate confinement, and challenges to procedures that are only allowed to proceed if they "would not be sufficient to undermine" the confinement. *Richmond*, 909 F.Supp. at 629. The court found it "difficult (though not impossible) to reconcile the decision in *Armento-Bey* with the dichotomy inherent in the *Heck* decision." *Id.* at n.8. The only way the court could achieve this reconciliation was by incorrectly assuming, like the Seventh Circuit in *Miller*, that Armento-Bey conceded that the procedural violation was harmless error. *Id.* Because it was "arguable" that Richmond's disciplinary sanction could not be allowed to stand, the court dismissed the claim. *Id.* at 633.

In *Williams v. Godinez*, the court reviewed a claim like Respondent's, where the "plaintiff seeks damages and injunctive relief that does not include restoration of good time". *Williams*, 1996 WL 124463, at 1. Despite this narrow request for relief, the court dismissed the case because "it is evident that any favorable ruling would by implication entitle plaintiff to return of the good time credits taken from him as a result of the

disciplinary hearings." *Id.*

In *Cochrell*, the inmate alleged that he was unconstitutionally denied parole based upon his race. Like Respondent, Cochrell challenged unlawful practices without challenging the result of those practices. For relief, Cochrell merely sought a declaration that the Defendants' actions were unconstitutional, and to "enjoin (defendants') illegal and unconstitutional practices". *Cochrell*, 1996 WL 78179, at 1. The Eighth Circuit affirmed the district court because "the essence of Cochrell's claim was that his parole has been unconstitutionally delayed, and that he was attacking the duration of his confinement and seeking an immediate or speedier release." *Id.*

The foregoing decisions directly contradict Respondent's assertion that *Heck* resolved the issue in this case with a "simple test" that allows prisoners challenging procedures of prison disciplinary proceedings to sue under § 1983. Until this issue is resolved, federal courts will continue to reach conflicting decisions on the jurisdictional question presented by prisoners who challenge such procedures.

D. Respondent's Due Process Claim Calls Into Question His Loss of Good-Time Credits.

According to Respondent, his due process claim does not implicate lost good-time credits because, regardless of the due process violation, Washington courts will uphold his disciplinary sanction unless there is "no evidence" in the record to support it. See Respondent's Brief at 10-11, *citing In re Anderson*, 112 Wn.2d 546, 772 P.2d 510 (1989); *In re Johnston*, 109 Wn.2d 493, 745 P.2d 864 (1987). To the contrary, Respondent's claim that he was unlawfully denied an opportunity to present exculpatory evidence, if proven, would result in a reversal of the disciplinary hearing officer's decision and sanction, despite the

existence of evidence in the disciplinary hearing record.[6]

Washington courts will grant a petition for relief from unlawful restraint if a prison disciplinary proceeding is "so arbitrary and capricious that it denied the inmate a fundamentally fair hearing." *Anderson*, 112 Wn.2d at 549, *citing In re Reismiller*, 101 Wn.2d 291, 294, 678 P.2d 323 (1984), *citing Wolff*. Such a hearing "is not arbitrary and capricious if the petitioner was afforded the minimum due process protections" set forth in *Wolff*. *In re Burton*, _ Wn. App. _, 910 P.2d 1295 (1996)(citing *Reismiller*, 101 Wn.2d at 294); *see, e.g., In re Plunkett*, 57 Wn. App. 230, 237, 788 P.2d 1090 (1990), (the Washington appellate court held that the decision by the prison official to hold the inmate's disciplinary hearing over the telephone "was not 'willful and unreasoning', and thus was not arbitrary and capricious").

If Respondent proves in federal court that the Defendants violated *Wolff* by maliciously excluding exculpatory evidence at his hearing, a Washington State court would be forced to conclude that Respondent's hearing was arbitrary and capricious, and his loss of good-time credits would not stand.

* * *
* * *
* * *
* * *
* * *
* * *
* * *

---

[6]Like Washington courts, the federal courts will reverse the decisions and sanctions of prison disciplinary officers where the prisoner is denied an opportunity to prevent exculpatory evidence. *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 31 (2nd Cir. 1991); *Campbell v. Henman*, 931 F.2d 1212, 1215 (7th Cir. 1991); *Hayes v. Thompson*, 637 F.2d 483, 493 (7th Cir. 1980); *Morgan v. Ellerthorpe*, 785 F.Supp. 295, 303 (D.R.I. 1992); *see also Hrbek v. State*, 478 N.W.2d 617, 619 (Iowa 1991) ("An unjustified refusal to permit live testimony of a defense witness ... will warrant reversal").

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

Talis Merle Abolins
John Scott Blonien*
William Berggren Collins
Mary E. Fairhurst
Assistant Attorneys General
Counsel of Record*
Counsel for Petitioners

April 1996